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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 291

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MACK SAXON, ANCILLARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE IN TEXAS OF THE ESTATE OF J. W. MOORE, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

E. E. McINNIS,
BALLINGER MILLS,
WM. H. BURGES,
A. H. CULWELL,
Counsel for Petitioner.

(36,105)

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Atchison, Topeka & Santa Fe Railway Company, respectfully represents to this Honorable Court that intervener, Mack Saxon, personal representative in Texas and Ancillary Administrator of the Estate of J. W. Moore, deceased, for the use

and benefit of his widow and children, recovered a judgment against your petitioner in the sum of $15,000.00 as damages for the death of said J. W. Moore (R. 29), who was killed while in the employ of your petitioner as a brakeman while engaged in interstate commerce.

The action was brought in the District Court of El Paso County, State of Texas, and was tried under the Federal Employers' Liability Act (R. 56), and upon appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas the judgment against your petitioner was, on October 24, 1929, reversed and cause rendered (R. 89) (Opinion, R., 79 *et seq.*). Writ of error was by the Supreme Court of the State of Texas granted (R. 111). The Supreme Court of Texas, under date of March 4, 1931, reversed the judgment of the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas, and affirmed the judgment of the District Court of El Paso County, Texas (R. 116), 36 S. W. (2d) 228. Motion for rehearing filed by your petitioner in the Supreme Court of Texas was by that court overruled May 20, 1931 (R. 127)—(Original Opinion, Supreme Court of Texas, R. 112, *et seq.*, and, on rehearing, R. 121 *et seq.*), 38 S. W. (2d) 775.

The overruling of the motion for rehearing by the Supreme Court of Texas was and is the final judgment of the Supreme Court of Texas in this cause, and said Supreme Court of Texas is the highest court of law and equity in said State in which a decision could be had in said cause.

This petition for a writ of certiorari is filed within

three months of the rendition of said final judgment, and there is presented herewith a certified copy of the entire record and proceedings in the Supreme Court of the State of Texas.

The contention of your petitioner is, in substance, that there is no evidence in the record to show how J. W. Moore, the deceased, met his death; that the evidence does not disclose that the negligence averred was the proximate cause of his death.

Summary and Short Statement of the Matter Involved.

Deceased was the head brakeman on the freight train in question, running from Clovis, New Mexico, to Vaughn, New Mexico. He was entirely familiar with the road, having been employed as above for many years. He met his death while on a run at Tolar, February 15, 1927. This train had taken the siding to permit a passenger train to pass. Deceased threw the switch between the siding and the main line, and was seen by a teamster running along the side of the freight train, which was in motion on the siding, and to make two motions as though he intended to climb on one of the cars (R. 46). The evidence does not indicate why he was making that effort, as he had no duty to perform on the train at that time, and was not expected to do other than watch the passing cars for hot boxes, stuck brakes, etc. No one saw the accident. The body was found lying beside the rails. There was blood on the thirty-third car from the engine, and blood on the rail at the point where the body was found. The accident happened in the daytime.

The evidence indicates that there was a rather soft area about three feet wide and possibly six or eight feet long in the pathway (Robinson, R. 54). This train was moving west, the passenger train in question was moving east. The teamster Mahon was the only witness who saw deceased, and states that deceased was running along by the side of the train, reached up as though he was going to catch it, didn't raise himself off the ground, continued to run along with the train, and made another attempt, reaching as before, but did not raise himself off the ground, and deceased, on account of obstructions, went out of his sight. When deceased was last seen he was east of the depression above referred to. The body was found west of that point some fifty or sixty feet (R. 47).

There was a footprint of the left foot, going west, in the soft area above designated (R. 51 and R. 54). After the accident, and before the discovery of the footprint above referred to, several different people walked up and down this same pathway (Mayhall, R. 73).

It further appears that just before the freight train entered the siding, deceased, while on the engine, had an understanding with the fireman, under which deceased was to line the switch for the passing track as the freight train was going in, and the fireman was to line the switch at the west end going out and onto the main line, and deceased was to inspect the train as it pulled through the passing track. The engine crew did not expect deceased to try to get on any car as the freight train was going through the siding (Delaney, R. 58).

At the conclusion of the evidence on the trial in the District Court of El Paso County, the defendant moved for a directed verdict on the ground that the evidence failed to indicate how the accident happened or what deceased was attempting to do at the time of the accident, which was overruled (R. 24). Defendant likewise requested a peremptory charge, which was refused (R. 29).

Cause was submitted to the jury on what is known as special issues, and findings were returned that there was a soft area or hole between the main and passing tracks, that deceased was running along the track and, while doing so, attempted to board one of the cars, stepped on or upon the area, was caused to fall and be injured; that this soft area was due to the negligence of the defendant, which was the proximate cause of the accident, and that deceased did not know of such soft area or hole (R. 19 and R. 25).

Petitioner herein duly filed its motion for a judgment, notwithstanding the answers of the jury, on the ground that as a matter of law there was no liability, no actionable negligence was shown; that the evidence was wholly inadequate to show how or in what manner deceased met his death; that it was necessary to build one presumption upon another before a conclusion in that behalf could be reached (R. 28). This motion was overruled, to which an exception was taken (R. 31). Peremptory charge in behalf of defendant was also refused (R. 25), and judgment entered as hereinabove indicated.

Motion for a new trial, based upon the same reasons

as are made basis of this petition, was overruled (R. 36).

For a better understanding of the general situation, there appear in the record three photographs indicating the character of the tracks, lay of the land, etc. (R. 78).

Reasons for the Allowance of the Writ.

Your petitioner respectfully represents that the writ of certiorari should issue because the Supreme Court of the State of Texas has decided a Federal question of substance erroneously and in a way probably not in accord with the applicable decisions of this Court, the question being:

> In an action for injuries resulting in death, arising and tried under the Federal Employers' Liability Act, and wherein it appeared that deceased, a brakeman, who had thrown the switch which admitted the train to the siding and who was neither expected nor required to get on the train while same was passing through the siding, but was expected to watch the cars as they passed, and who was seen to make two moves a though he was undertaking to catch some car while running along by the side of the train, was not seen to stumble and whose body was found lying by the side of the track, and wherein it further appeared that the print of a left shoe, pointed in the same direction was seen in a soft area, and other people had traveled the same route between the time of the accident and the discovery of the shoeprint, and there is nothing to indicate what deceased was doing at the time of his death, nor to indicate the kind, character or size of shoe worn by him, and nothing on the ground to indicate that he had stumbled,

whether the evidence is of such probitive force as to justify a conclusion of negligence warranting judgment against the railway company for his death. We question the holding of the Supreme Court of Texas to the effect that the cause of the accident appeared with such certainty as to indicate liability under the Federal Employers' Liability Act.

Was there sufficient evidence of negligence to go to the jury?

WHEREFORE your petitioner, referring to the attached brief in support of its reasons for review, respectfully requests that this Court issue a writ of certiorari directed to the Supreme Court of the State of Texas, to certify and send to this Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court, as provided by law, and that the decision of the Supreme Court of Texas may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
E. E. McINNIS,
Chicago, Illinois;
BALLINGER MILLS,
Galveston, Texas;
WM. H. BURGES, AND
A. H. CULWELL,
El Paso, Texas,
Counsel for Petitioner.

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MACK SAXON, ANCILLARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE IN TEXAS OF THE ESTATE OF J. W. MOORE, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions.

As appears from the petition, the Court of Civil Appeals of the Eighth Supreme Judicial District rendered an opinion reversing the judgment entered in the District Court of El Paso County, Texas, holding in effect, that the evidence was not of such probitive force as to warrant recovery under the Federal Employers' Liability Act (R. 79 *et seq.*), reported in 21

S. W. (2d) 686. This judgment was by the Supreme Court of Texas reversed, and that of the District Court of El Paso County affirmed (R. 112 *et seq.*), 36 S. W. (2d) 228, and on motion for rehearing another opinion to like effect was written (R. 121), 38 S. W. (2d) 775.

This Court has Jurisdiction.

The question presented arises under the Federal Employers' Liability Act, ch. 149, 35th stat. 65. The case is governed by that Act, and the principles of the common law as applied in this Court.

We quote:

> "But proof of the negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. Patton *v.* Texas & Pac. Ry. Co., 179 U. S. 658; New Orleans & N. E. R. R. Co. *v.* Harris, 247 U. S. 367, 371; St. Louis & San Francisco Ry. Co. *v.* Mills, 271 U. S. 344, 347; C. M. & St. P. Ry. *v.* Coogan, 271 U. S. 472; New York Central Railroad Co. *v.* Ambrose, 280 U. S. 486. Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death."—A., T. & S. F. Ry. *v.* Toops, 281 U. S. 354.

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. Texas & Pacific Railway *v.* Barrett, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."—Patton *v.* T. & P. Ry. Co., 179 U. S. 658.

"The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the car-

rier's negligence was a cause of the death, judgment against the carrier will be reversed."—C., M. & St. P. Ry. *v.* Coogan, 271 U. S. 472.

"No employment is free from danger. Fault or negligence on the part of the petitioner may not be inferred from the mere fact that respondent fell and was hurt."—M. P. Ry. *v.* Aeby, 275 U. S. 426.

If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed; C. M. & St. P. Ry. Co. *v.* Coogan, 271 U. S. 472-474; Toledo, St. L. & W. R. R. Co. *v.* Allen, 276 U. S. 165; Atlantic Coast Line *v.* Davis, 279 U. S. 34.

The gist of the petitioner's contention in this case is that the evidence did not support the verdict, nor the judgment of the Supreme Court of Texas thereon, hence, under the foregoing decisions we believe that we are justified in asking the Court to examine the record and see whether our contention is correct.

Statement.

It is believed that we have made a sufficiently full statement of the facts in our petition, and that it will not be necessary to repeat except so far as it may become proper or desirable to restate some of the facts in the course of the argument.

All that the record discloses regarding the death of Moore is, that as head brakeman he threw the switch permitting the train to take the siding, having had an understanding with the fireman that the latter would open the switch at the far end. Deceased then alighted

from the engine, and as the train was going into the passing track undertook to throw his flag into the gangway of the engine, and continued moving along the passageway between the passing and main line tracks in the direction the train was going (Christie, R., 64). He was out of sight of the remainder of the crew. It is thought that the events following are better told in the language of the witness Mahon:

> "When I first saw Mr. Moore he was running along by the side of the train, and he just reached up like he was going to catch on, but he didn't raise himself off of the ground. The best I could see, he didn't catch it, he caught at it but didn't catch it. When I saw him first make the motion as though he was getting on the train it looked like it was something like about three car lengths behind the engine. After that he ran on west, the same way the train was going. When I first saw him make that motion with his hands, he was right west of the east end of the switch there, just west of the crossing (referring to Exhibit A). This is a crossing, and the first time I seen him he was right in just west of this crossing. After making this first motion while he was running along by the side of the train, about the third car, he continued to run along with the train. The train was out-running him. Then I seen him make another attempt. that is, reach like he was going to catch again. That was the same kind of reaching as before, but I never did see him raise himself off of the ground. He made the same kind of motion toward the car as before. Then he was out of my sight. He was running the last time I saw him, and went out of my sight" (R., 46-47).

The evidence does not disclose the happenings from that moment until the body was discovered.

Leonard Mahon, a fourteen-year-old boy, who was at school at the time of the accident, went to the place later in the day—saw the blood. This was probably two hours after the accident. He saw a soft place in the pathway and a footprint pointed west. It was the left foot. The soft place was six or eight feet, may be ten feet, east of the place where Moore was killed (R., 51). Irving Smith (R., 52-53) testified to like effect.

Robinson, a photographer, took some photographs and testified that the place where there was blood was pointed out to him. He saw a hole or depression, not exactly a hole, a bit lower place than the surrounding ground, not much lower, but a little lower. It was posbly some six or eight feet long, and possibly three feet wide; that it was a little bit lower than the other ground surrounding it. He stepped in it to see if it would give.

> "As to whether or not it would give sufficiently to cause a man to lose his balance who was running, I will say that in my opinion it might cause a man to stumble who was running, and it might not, depending upon the circumstances. In my opinion, whether a man knew it was there or didn't know it was there, or was looking where he was stepping. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment. The hole was right in the pathway. It was well beaten. It was the same

> color, but you could tell it was worn out. That pathway was close to the track'' (R., 53-54).

The above is the substance of the evidence under which a recovery was held to be warranted by the Supreme Court of Texas.

The witness Mayhall walked along by the side of that string of cars in between the main line and the passing track after the accident, and testified:

> ''After the accident there were other people walking up and down there that morning, several different people walked up and down there'' (R., 73).

There is no evidence in the record indicating that anyone had stumbled. The only thing disclosed is one bare shoe print.

Petitioner's motion for rehearing was by the Supreme Court of Texas overruled on May 20, 1931 (R., 122), which constituted the final judgment in the case.

Assignments of Error.

The Supreme Court of Texas erred:

1st. In holding that the evidence was sufficient to sustain the jury's finding of negligence on the part of the defendant, and to support the verdict and judgment.

2nd. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from

which the legal conclusion could be drawn that the railway company was liable.

3rd. The judgment of the Supreme Court of Texas affirming that of the District Court of El Paso County, Texas, is at most based upon a *possibility*, to reach which it is necessary to indulge more than one presumption, which is wholly insufficient to fix a liability under the Federal Employers' Liability Act and the applicable principles of the common law as applied in this Court.

ARGUMENT.

THE CONTENTION OF YOUR PETITIONER MAY BE STATED JUST:

1st. We claim that there was no evidence to show that the negligent act found by the jury on the original trial of this case was the proximate cause of the death of Moore. In other words, admitting that there was a soft area in the pathway, there is no evidence that such soft area was the proximate cause of the accident.

2nd. We contend that under the decisions of this Court, a recovery for injuries resulting in death under the Federal Employers' Liability Act may not be predicated upon presumption.

I.

There was no evidence to show that the negligent act found by the jury was the proximate cause of the death of Moore.

As a matter of fact, this cause was determined on surmise. The only facts really established on the trial are:

(*a*) Deceased was an employee of the defendand, an interstate carrier engaged in interstate commerce at the time of the accident;

(*b*) He was killed while engaging in that service.

The rest of the case as made by the plaintiff is wholly dependent upon surmise and conjecture. THE EVIDENCE DOES NOT SHOW WHAT CAUSED THE DEATH OF MOORE, and this patent fact is fatal to the right of recovery under the Federal Employers' Liability Act. The burden was on the plaintiff to show the cause of the accident, and that it was a negligent cause for which the defendent was liable.

The fact that deceased was killed does not, under the Federal Employers' Liability Act and the holdings of this Court, impose a liability, AND NO INFERENCE OF NEGLIGENCE MAY BE INDULGED FROM THE ACCIDENT ITSELF.

There is no evidence that deceased stepped in a soft place and was caused to fall, and the fact that there was found two hours afterward the print of a shoe in a soft place, gave to the court no right to indulge a presumption in favor of deceased in that behalf, particularly as it appeared that many other people had used the same pathway in the interim. There is no casual connection between the soft area, the footprint and the death. No effort was made on the trial of this case to connect the footprint so found with the shoe worn by deceased, or otherwise than merely the fact that deceased had

traveled the area. There is not a scintilla of evidence even suggesting that the one making the footprint was caused thereby to stumble and fall, and assuredly there is no evidence that the print in the soft area was made by deceased.

The Supreme Court of Texas, in effect, held, as we construe its opinion, that the print could have been made by deceased and, therefore, was—that he could have stumbled and fallen under the train and, therefore, did.

Petitioner has a right to insist that any judgment must be based upon actionable negligence sustained by proof of a quality concerning which reasonable minds may not differ, and which unerringly convicts it of the exact negligence averred.

The jury found that deceased was running along the track, and while doing so, and attempting to board one of the cars with which he was working, stepped on or upon a soft area or hole and was thereby caused to fall. There was, in truth, no occasion for him to do any of the things therein found, and particularly, he had no accasion to be on the cars. He had no business trying to get on the moving train, if he was so trying, and the members of the engine crew were not expecting him to make that attempt. He was, if doing these things, serving a purpose of his own, and not in line with his duty under the circumstances. This was a voluntary act, the risk of which he assumed. Had he been standing beside of the cars, watching as they went by for defects and hot boxes, as it was understood he would, doubtless there would have been no accident. These

things are merely mentioned to indicate the undisclosed, which is to say, that the record does not indicate what he was doing.

The Supreme Court of Texas, in its opinion on motion for a rehearing, states that it is presumed that deceased proceeded with due care, and that he did not voluntarily place himself in a position of peril (R., 122). Taking the uncontroverted evidence as true, as we must, deceased voluntarily placed himself in a position of peril, because he had no duty to perform ON THE TRAIN as it proceeded through the siding. The evidence on this is referred to in our petition.

We therefore submit that no presumption may be indulged in favor of the deceased as to the exercise of care under the circumstances, and insist that the evidence does not disclose the proximate cause of the accident.

II.

A recovery predicated upon surmise or conjecture is wholly unwarranted.

The Court of Civil Appeals, very aptly and correctly as it seems to us, stated this record when it said:

> "It is only a surmise that the deceased stepped on the soft place. Somebody did, but who or when is not made to appear. Even if it be conceded that deceased stepped on the soft area, there is nothing to indicate that it caused him to fall" (R., 87, 21 S. W. (2d) 689).

and again:

> "It is not made to appear that had the deceased, while running where the footprint was

> seen, fallen by stepping in the soft ground, he would necessarily, or even probably have fallen under the train. We have concluded that there is not sufficient causal connection shown between the soft area, hole or depression, and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured'' (R., 87, 21 S. W. (2d) 689).

We do not believe that these statements of fact can be challenged.

As applied to cases of this character, it is a rule of universal application, that the burden was upon plaintiff to establish:

> (*a*) The fact that the deceased stepped upon the soft area;

and

> (*b*) That in so doing he was caused to fall and be injured;

and this burden is not met by showing that he was killed, and that his death could have resulted that way. Evidence which leads unerringly to these results is required before it can be said that they are established. These elements are entirely lacking in this case. There was as much opportunity for one of several others to have made the footprint as deceased. We do not even know whether the footprint was similar to one that could have been made by deceased, and as we have before indicated, there is nothing to indicate that deceased stumbled, which we believe would have been

physically necessary before he would have been in peril of falling under the train.

There are so many missing links in the cause as presented as to be fatal to the right of recovery. The only liability claimed arises under the Federal Employers' Liability Act, and if we have not misconstrued the holdings of this Court in several cases, it would seem that petitioner is entitled to relief.

Permit us to refer to Kansas City Southern Ry. Co. *v.* Jones, 276 U. S. 303. Body of deceased was found between the main track and the parallel track. No one saw the death, and after analyzing the evidence the court used this language:

> "Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself."

The most recent case called to our attention is A., T. & S. F. Ry. Co. *v.* Toops, 281 U. S. 351, and which has been previously cited herein. It has occurred to us that the occasion of death was as well shown there as here, and that in neither case did the evidence measure up to the standard required justifying recovery. The closing lines in that opinion are here relied upon:

> "If allowed to sustain the verdict, it would remove trial by jury from the realm of probability based on evidence to that of surmise and conjecture."

Permit us to say again that if Moore was in peril, no other member of the train crew knew it. If he was

attempting to get on the train, no other member of the crew anticipated that he would do so. His work at that time did not require it. Just what he was doing, why and the necessity therefor, is not explained in the record, and without extending this argument, we submit that the plaintiff failed to present evidence of any force showing the cause of accident.

Respectfully submitted,

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.
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